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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947



FREDERICK FRANCIS ZIEBER, JR.

Petitioner

v.

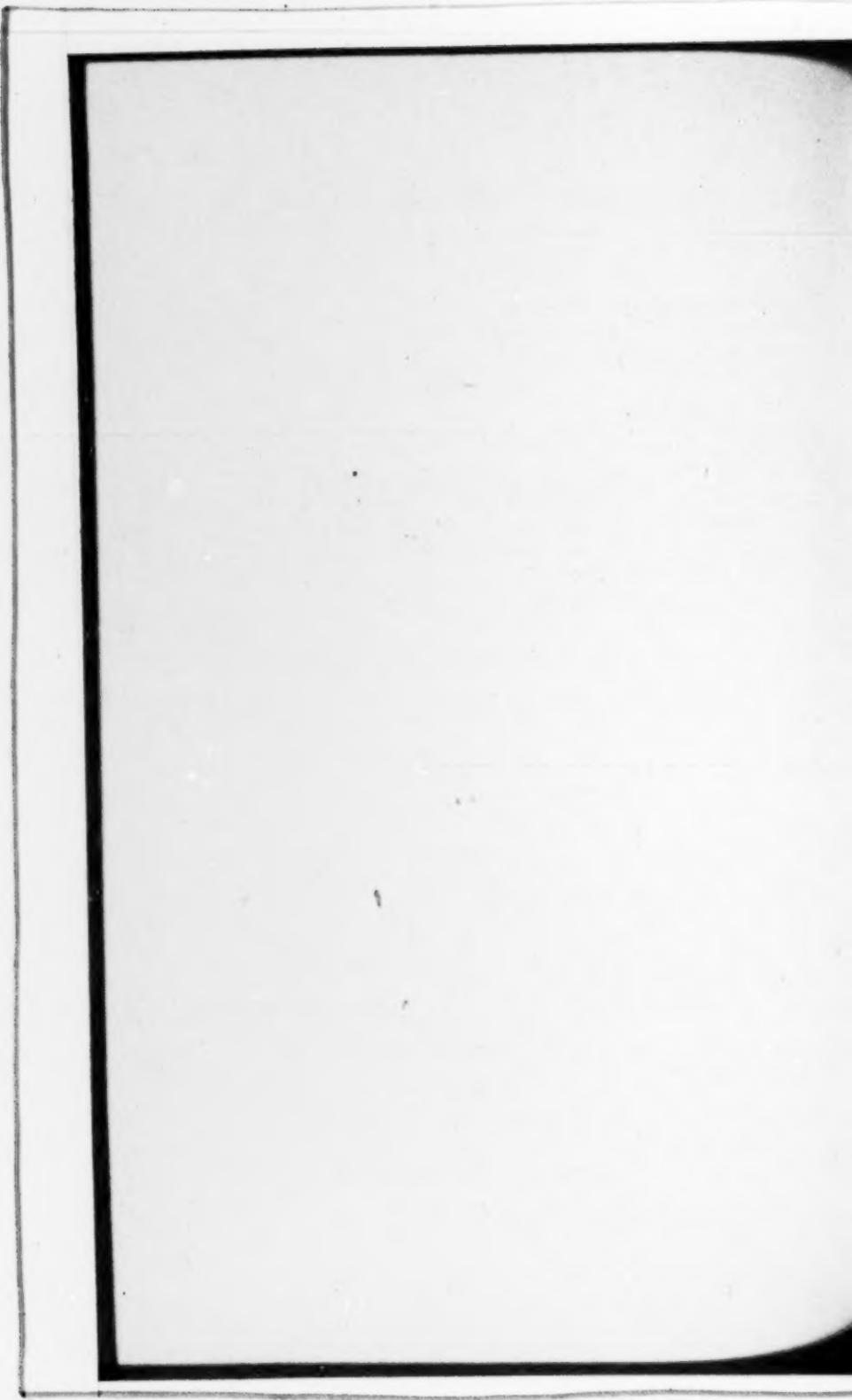
THE UNITED STATES OF AMERICA

Respondent



**Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Third Circuit**

HAYDEN C. COVINGTON :
Counsel for Petitioner



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SUPREME COURT OF THE UNITED STATES

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Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent



Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Third Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Frederick Francis Zieber, Jr., petitions this Court for a writ of certiorari. He shows unto the Court as follows:

Opinion of the Court Below

The opinion of the circuit court of appeals is reported at 161 F. 2d 90. It appears in the record. [266-271]:

¹ Bracketed figures appearing in this petition and supporting brief refer to printed transcript of record.

Jurisdiction

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

Timeliness of This Petition

The judgment of ~~affirmance~~ was rendered and entered April 28, 1947. [271] On September 23, 1947, petitioner filed with the court below a motion for leave to file out of time his petition for rehearing, together with a petition for rehearing. [273] On September 29, 1947, the court below ordered the motion granted and allowed petitioner to file his petition for rehearing out of time. [272] On November 18, 1947, an order by the court below was entered amending the opinion whereby certain objectionable parts of it were deleted, and overruling the petition for rehearing. [285] The time for filing the petition for writ of certiorari began to run on November 18, 1947. Pursuant to application of counsel, on December 10, 1947, an order was rendered by this Court extending the time for filing the petition for writ of certiorari to and including December 30, 1947. [289] The petition for writ of certiorari is filed within the time specified by this Court.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 615.82, 622.44, 622.51, 623.1, 623.2, 625.1, 625.2, 626.1, 626.2, 626.3, 627.13, and 652.2 of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

Questions Presented

1. Should the trial court have granted the motion for judgment of acquittal because of the failure of the local board, upon petitioner's personal appearance, to grant him a full and fair hearing?
2. Should the trial court have granted the motion for judgment of acquittal because the local board denied petitioner a full and fair hearing before the board of appeal by failing and refusing to reduce to writing oral evidence offered by petitioner upon his personal appearance before the local board?
3. Should the trial court have granted the motion for judgment of acquittal because of the failure of the local board to mail petitioner a new classification card following his personal appearance and sending the draft board file to the board of appeal without notice to petitioner which illegally deprived him of the right to submit a written statement to the board of appeal?
4. Should the trial court have granted the motion for judgment of acquittal because of the failure of the classification, and the denial of petitioner's claim for exemption as a minister of religion by the local board, to have basis in fact?
5. Did the court of appeals err in failing to hold, as a matter of law, that petitioner's rights under the Act and Regulations had been violated by the local board, and order the indictment dismissed rather than remand the case to the trial court with instructions to submit the questions to the jury for determination?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the district court by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [1] The indictment charged that petitioner, subject to the Selective Training and Service Act of 1940, "did knowingly fail to comply with an order of Local Draft Board No. 2, in Hamburg, County of Berks, to report on December 3, 1945, at the office of the aforementioned Local Board, to entrain for work of National Importance at Civilian Public Service Camp Number 128 located at Lapine, Deschutes County, in the State of Oregon." [1]

Thereafter petitioner pleaded "not guilty". The trial to a jury before the court began on September 17, 1946. [2] The court received evidence upon the trial. The case closed when all the evidence was in on September 19, 1946. [183] At the close of the evidence petitioner moved for dismissal of the indictment and for a judgment of acquittal [149-152] In that motion the reasons were stated extensively. [149-152] The motion was denied and exceptions allowed. [152] Petitioner duly submitted to court, before argument of counsel to the jury, his requested instructions to the jury. [156-172]

On September 19, 1946, the cause was argued to the jury by counsel. [152] Thereupon the court charged the jury. [152-178] The court granted all of petitioner's requested charges to the jury. [156-172] Petitioner duly objected and excepted to the court's charge. [178-181] The jury retired to consider the verdict. [183] The jury rendered its verdict of guilty on September 19, 1946. [183-184]

On September 24, 1946, before the court pronounced judgment and sentence upon the verdict, the petitioner presented his renewed motion for judgment of acquittal,

in which the grounds were extensively stated. [197-200] The motion for judgment of acquittal was extensively argued. [185-193] The court denied the renewed motion. [193-195]

On September 24, 1946, the United States District Judge rendered judgment upon the verdict of the jury and sentenced petitioner, committing him to the custody of the Attorney General for a period of three years. [195-196, 264]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [265]

On April 28, 1947, the court rendered its opinion reversing and remanding the case to the district court for a retrial. [266-271] By special leave of court a petition for rehearing was allowed to be filed out of time. [272] That petition was overruled. [285]

This petition for writ of certiorari brings up for review the judgment of the court below dated April 28, 1947, which did not become final until November 18, 1947, at which time the petition for rehearing was overruled. [285]

FACTS

Frederick Francis Zieber, Jr., registered with Local Board No. 2, Hamburg, Berks County, Pennsylvania, on December 24, 1942. [3, 100] At that time he was 18 years of age. [3, 100] The questionnaire was mailed to him January 19, 1943. [4, 100] He properly filled in the questionnaire and returned it to the local board on January 29, 1943. [4, 100] In the questionnaire he showed that he was a minister of religion. [204] Although he was not "formally" ordained, he informed the board in the questionnaire that he was an ordained minister and that he had customarily served as a minister since November 15, 1942, as one of Jehovah's witnesses, under direction of the Watchtower Bible and Tract Society. [204, 206-207] In his questionnaire he also informed the board that he was secularly employed as a paint filler with the Glidden Company of Reading, Pa.

[202, 203] Accompanying his questionnaire was a written statement showing that he was forced to engage in secular work because of obligation to support his mother, an invalid. [207-208] He claimed exemption as a minister of religion and requested the board to place him in Class IV-D. [100-101, 205] In his questionnaire he showed that he had conscientious objection to participating in combatant and noncombatant service. [204-205] As a result of this claim he was mailed a conscientious objector form, which he filled in and returned to the local board. [100-101] His answers appearing in this form augmented by additional proof the evidence submitted with the questionnaire that he was regularly engaged as a minister of religion. [211-214, 215-217]

Before the board considered his claim for exemption as a minister of religion he was ordered to report for preinduction physical examination on November 8, 1943. [4] As a result of that examination he was found to be physically unfit for military service and training on March 11, 1943, and thereupon placed in Class IV-F. [4, 101, 205] He remained in that classification for over a year. On or about August 28, 1944, as a result of the petition of the Glidden Company, he was placed in Class II-B-F, which deferred him because of his secular employment in essential industry. [4, 5, 101, 206] After remaining in this deferred classification for about a year he was ordered to report for another preinduction physical examination on August 1, 1945. [5] This time he was medically found to be physically fit. [5, 6, 206] Thereupon the local board denied his claim for exemption and found him to be liable for training and service as a conscientious objector in a civilian public service camp, placing him in Class IV-E August 13, 1945. [5, 102,

106] This classification was based only upon the papers appearing in his file.²

After he was notified of denial of his claim for exemption and the classification making him liable for training and service, he went to the board on August 21, 1945, and filed a written request for personal appearance. [11, 102, 220] Along with the request for personal appearance he filed a long "written argument" in which he discussed his case extensively. [102-103, 230-245] Attached to that "written argument" were written petitions signed by scores of persons whom petitioner served as minister of religion at his congregation in Kutztown. [246] Also attached to that "written argument" was a certificate issued by the Watchtower Bible and Tract Society, certifying that he was an assistant presiding minister of the Kutztown company of Jehovah's witnesses. [247-248] When these papers were filed with the local board on August 21, 1945, petitioner instructed the board that he was submitting them for its consideration in order that the board might become better acquainted with his case before his personal appearance. [102] At the time he filed this information he also reviewed his Selective Service file. [12]

On August 27, 1945, petitioner appeared before the local receipt of his request for personal appearance in which it commanded him to appear before the board for hearing on August 27, 1945. [19, 102, 221]

On August 27, 1945, petitioner appeared before the local board at the time fixed for his personal appearance. [26, 74, 102] He stated that he waited in the office of the board about 30 to 45 minutes before his case was called for hearing. [103] He was accompanied by Henry Bieber, presiding

² Upon the trial of this cause in the court below the clerk of the local board erroneously testified that the classification was the result of a hearing had before the board on August 13, 1945. [6] The clerk admitted that this was an error; that there was no hearing on August 13. [19]

minister of the Kutztown company of Jehovah's witnesses, who went along as a representative of the Watchtower Bible and Tract Society to give verbal testimony about the ministerial status of Zieber with the Society. [74, 104] Zieber was denied the right to testify before the board because his testimony was not previously reduced to writing. [73-75, 103]

There is a sharp conflict in the evidence as to the duration of the personal appearance that Zieber made before the board. Zieber testified that after waiting between 30 and 45 minutes he appeared before the board and was summarily denied his right to offer oral evidence, the board stating that they were interested only in written evidence and would not hear oral testimony. [105, 109] He said he was summarily dismissed from the board after appearing before it for only ten minutes. [109] Zieber testified that when he appeared before the board he was prepared to offer additional oral evidence upon many important points as to his activity and status as a minister of religion, that had not been covered in any of the written evidence then contained in his file. He stated that all these matters would have been submitted by him to the board had he been permitted to testify extensively. [103-109]

The clerk of the local board testified that on August 27 Zieber had a hearing before the board for more than 45 minutes. [27] The clerk testified that all of the various new items about which Zieber said that he intended to tell the board were actually told the board at the time he appeared on August 27. [143] The clerk again stated that Zieber was before the board for three-quarters of an hour, during which time the board heard and listened to everything that Zieber had to say. [146, 147]

The testimony of the clerk corroborates the testimony of Zieber that he offered to the local board and called to their attention State Director Advice 213-B, a directive from National Headquarters of the Selective Service Sys-

tem concerning the ministerial status of Jehovah's witnesses like Zieber, which the local board refused to accept and failed to consider upon the personal appearance. [105, 144, 145]

The clerk testified that oral evidence on new matters was submitted to the board by Zieber upon his personal appearance before the local board. [143, 147]⁸

Zieber informed the board upon the personal appearance that the directive of General Hershey appearing in State Director Advice 213-B applied to him, and that it required the board to classify him as a minister of religion in spite of his secular employment. [105, 106, 248-250, 251, 253-254] He informed the board that in the orthodox religious organizations both practice and necessity required some clergymen to engage in secular work, but that this did not prevent them from regularly and customarily performing their ministerial duties. He told them that it was their duty to consider whether or not he was a minister regularly preaching, and not to decide his case on the basis of whether or not he performed secular work. [106] He informed the board that no particular form of document was specified for proof of ministerial status. [106] He also informed the board that the reason his name did not appear on the certified official list of Jehovah's witnesses issued by National Headquarters of the Selective Service System was because the list was confined to full-time missionary evangelists and that there was no requirement that one performing the part-time type of ministerial work such as he was performing be listed with National Headquarters, and that it was improper for the board to consider whether or not his name

⁸ In view of the fact that it is the duty of this court, upon reviewing the conflicting evidence, to accept the Government's version of the facts, petitioner here states the facts concerning new evidence which he intended to offer to the local board, but which he claims he was denied the right to offer, as though that evidence was actually offered to the local board and actually received by it upon the personal appearance as contended by the Government's witness, Jay C. Gaumer. [143, 147]

appeared on the certified list. [106] Furthermore, he informed the board that under the directive of the Selective Service System any assistant presiding ministers occupying a position such as that which he occupied in reference to the congregations of Jehovah's witnesses (who stand in the same relation to such congregations as do the orthodox clergy toward their congregations) are entitled to classification as ministers of religion even though they perform secular work on the side and their names do not appear on the certified official list. [106, 107] He also informed the board that he had duties as assistant presiding minister that had been delegated to him by the presiding minister and therefore he stood in relation to the Kutztown congregation of Jehovah's witnesses as the presiding minister. Moreover, he pointed out that he was being trained to take over the duties of presiding minister of the congregation. [108] He pointed out that the Watchtower Bible and Tract Society intended to make him presiding minister of the congregation because it was not convenient for Bieber, the presiding minister, to handle the job because of his living twice as far from Kutztown as did Zieber. Also he showed that Bieber was only temporarily assigned as presiding minister until Zieber could take over the duties. [108]

Zieber testified that he was required to preach as a missionary evangelist from house to house and door to door and publicly upon the streets 28 hours per month. [93, 94, 95] Additionally, he testified that as assistant presiding minister of the congregation it was necessary for him to regularly deliver sermons to the congregation, instructing them on the Bible and as to better ways and means of preaching the gospel, as well as to participate in the Theocratic Ministry school. [95-97] The proof showed that he was required to devote approximately ten hours per month to the delivery of sermons before the congregation as assistant presiding minister. [96-99]

In addition to all this, Zieber testified that he was re-

quired to devote approximately ten hours per week to study and preparation for performance of his duties as missionary evangelist and as assistant presiding minister of the congregation. [95]⁴

None of this oral evidence had been theretofore submitted to the board in writing or considered by it. [201, 219, 230-245]

Zieber testified that when he walked into the room before the board on August 27 the members of the board "mentioned that my case had already been appealed to the State Appeal Board." [108] He told the board that he did not know anything about that because he had never signed any appeal papers. [108] He then told them that he was appealing to them; that is to say, to the members of the local board, "to give me this Class IV-D decision." [109]

The chairman of the local board testified that at the time Zieber appeared before the local board the board considered that Zieber's case had been appealed, through Zieber's filing his "written argument". [48, 49, 230, 245] He also said that he asked Zieber whether the board was to consider his letter as an appeal for a IV-D classification and Zieber said "yes". [48-49]⁵

⁴ These facts testified to by Zieber upon the trial in the court below, as to the scope of his ministerial activity, would have been offered to the board had he been given an opportunity to testify before the board about his ministerial activity. He testified that he tried to explain these facts to the board but they would not listen to him. [104-105] It should be remembered that the clerk testified that "Most of the things that he [Zieber] stated today I heard him endeavor to tell the Board on August 27, 1945" [143], in spite of the fact that the clerk was 'in and out of the hearing room' and did not remain therein continuously. [146]

⁵ It is significant to observe that the blank usually provided for a registrant to sign for appeal to the board of appeal is unsigned in the space provided therein for the registrant's signature, and that beneath the printed-form statement of appeal there is written the following: "8-21-45 Registrant's 'Written Argument' of Classification." [205]

Both the clerk and the chairman of the local board testified that although the members of the local board listened to Zieber for 45 minutes, the board did not legally consider his testimony in determining his classification, but, on the contrary, ignored and rejected all of it because the board considered that he had already appealed his case on August 21, 1945, by the filing of his "written argument". [26, 27, 29, 37, 48, 49, 147-148]

The chairman testified that the local board did not consider Zieber's personal appearance as though it was a hearing required by the Selective Service Regulations; but, on the contrary, considered that they were not required to give him the hearing or allow him the right to appear on August 27, and that the board regarded his appearance before the local board on such occasion as though it was an application to reopen a classification after an appeal had been taken and determined. [46, 47, 48, 49, 50]

The undisputed evidence shows that the local board wholly failed to reduce to writing any of the oral testimony given to it by petitioner upon the occasion of his appearance before the board on August 27, and by reason thereof all of said oral testimony was withheld from the board of appeal by the local board. [28, 29] The reason that the oral evidence was not reduced to writing as required by the Regulations was because the "written argument" filed by petitioner on August 21 was considered as an appeal, and the local board regarded that as excusing it from the responsibility of reducing such oral testimony to writing. [20, 21, 28, 29] Furthermore, the chairman of the local board testified that if the oral evidence submitted by the petitioner had been regarded by the board as being sufficient for consideration petitioner would have been required by the board to reduce it to writing before the classification was finally considered or the case forwarded to the board of appeal. [50]

The chairman of the local board testified that the reason Zieber was denied his claim for exemption as a minister and IV-D classification was because on checking with the State Headquarters as to whether or not his name appeared on the certified official list issued by the National Headquarters of the Selective Service System it developed that his name did not appear thereon. [53, 54, 56]*

The undisputed evidence shows that when Zieber left the local board, following his appearance there on August 27, 1945, the members of the board informed him that he would be notified of a classification as a result of his personal appearance before the board. [109] The clerk of the local board admitted that no notice of any character was sent out by the local board concerning its action upon Zieber's personal appearance following the hearing given him on August 27, 1945. [31-32, 47] Zieber expected to hear from the board but did not hear anything about his classification until, to his great surprise, he learned that his case had been decided by the board of appeal, resulting in a final IV-E classification. [109, 110] Zieber testified that had he known that his case had been forwarded to the board of appeal he would have written a letter or prepared a memorandum incorporating all the oral testimony that he attempted to give the local board to consider on August 27, but which they refused. [110] Following the final classification by the board of appeal, upon the request of the petitioner the National and State Directors of Selective Service, as well as the President of the United States, refused to review the determination of the local board and the appeal board. [110-111, 259, 260, 262]

Following the final IV-E classification by the board of appeal on September 13, 1945, the National Director assigned petitioner to a civilian public service camp and directed the local board to order him to report for work

* See also the testimony of the clerk of the local board. [33, 34]

of national importance. [7-8] On November 20 the order to report for work of national importance issued, commanding him to appear on December 1. [7-8, 228-230] The petitioner's request for stay of induction because of hardship was denied. [12, 222-223] On December 1, due to a transportation strike, the time for reporting was extended to and including December 3, 1945. [8] On December 3, 1945, the local board received a letter dated November 29 from Zieber stating that he would not report as ordered because of the illegal action of the local board in denying him his claim for exemption as a minister of religion. [9, 12]

Zieber was reported to the United States Attorney as a delinquent and thereafter he was arrested and held for prosecution under the indictment returned against him in this case. [9]

How Issues Raised

At the close of all the evidence petitioner moved for a judgment of acquittal, which was renewed following the verdict, on the grounds that the undisputed evidence showed that the orders of the administrative agency were made without basis in fact, contrary to the undisputed evidence, in excess of statutory authority, without jurisdiction, contrary to the Act and Regulations, and contrary to the due process clause of the Fifth Amendment to the Constitution. [149-151, 197-200] Moreover, it was asserted that the action of the administrative agency was arbitrary and capricious. [150, 198] In the motion it was claimed that there was no evidence showing that petitioner is not a minister of religion as claimed; that there was no evidence before the local board, appeal board or the court showing petitioner is not a minister of religion as claimed and established by the evidence; that the undisputed evidence showed that he was regularly performing duties as a minister of religion within the meaning of the Act and Regulations. [149-150, 197-198]

In the motion petitioner also contended that the undisputed evidence showed that the local board frustrated his appeal to the board of appeal by withholding evidence submitted to the local board and which was considered by it in that the local board refused and failed to reduce to writing oral evidence given by him at his personal appearance. Petitioner contended that the undisputed evidence showed that the local board had violated Sections 625.2 and 627.13 (b) of the Selective Service Regulations in withholding such evidence from the board of appeal. [150-151, 199-200] Moreover, he contended that the local board illegally and capriciously denied him the right to a full and fair hearing upon a personal appearance. [150-151, 198-199] It was claimed, as grounds for the judgment of acquittal, that this action was contrary to Sections 615, 623.2, 625.1, 625.2, 626.1, 627.12, 627.13, of the Regulations. [150-151, 198-200]

Upon appeal, the court of appeals held that the various issues raised in the motion to dismiss were not grounds for dismissal of the indictment but that such questions should be submitted to the jury. [268-270]

The court instructed the jury that even though the draft boards may have acted without basis in fact and in excess of their authority in denying petitioner's claim for exemption, if the jury found that the draft boards acted in good faith and honestly made a mistake, petitioner could not challenge the classification in defense to the indictment, but that it would be his duty to comply with the order. [172-173, 175, 177] Exception was taken to this instruction of the court. [178-179, 180] The jury also was instructed by the court that even though it should be found that the draft board violated the Regulations in disregarding petitioner's evidence given upon a personal appearance, illegally considering his case as having been appealed, failing to notify him of the sending of his case to the board of appeal, and failing to reduce to writing the oral evidence received by it, if the jury found that the draft board had acted honestly,

conscientiously and in good faith, such violations of the Regulations would be immaterial and irrelevant and could not be considered by the jury in determining whether or not the petitioner was guilty or not guilty. [173, 175, 176, 177] Petitioner duly excepted to this charge of the court as being contrary to law. [178-180]

Specification of Error

The Circuit Court of Appeals for the Third Circuit erred—

- (1) In reversing the judgment and remanding the case for a new trial;
- (2) In failing to order the judgment reversed and the indictment dismissed; and
- (3) In failing to hold that the motion for judgment of acquittal should have been granted.

Reasons Relied on for Granting the Writ

There is an important question of federal law presented in this case which has not been, but which should be, decided by this Court. When the undisputed evidence shows that the draft board has violated the Regulations and denied the petitioner procedural rights that resulted in an unfair hearing before the board of appeal, is it the duty of the court of appeals to reverse the judgment and order the indictment dismissed rather than remand the case to the district court for a new trial?

Another important question of federal law, which has not been, but which should be, decided by this Court, is presented. In this case, the Government's witness testified to facts which, although denied by petitioner, establish that the order of the administrative agency was void. In such case where the Government's own evidence was that the order of the administrative agency is void, is it the duty of the court of appeals to order the motion for judgment

of acquittal granted rather than remand the case to the district court for a new trial, because the evidence of the Government will be the same upon another trial and will establish the invalidity of the order?

In this case petitioner testified that he attempted to give evidence upon a personal appearance but was denied the privilege. The clerk of the local board testified that petitioner was granted the privilege and gave substantial and material testimony orally for about 45 minutes. The Government's witness also testified, and the Government conceded in the court below, that the draft board failed to reduce to writing any of the oral testimony given. This was a conceded violation of the Regulations. Invalidity of the draft board order because of the violation of the Regulations was established by the undisputed evidence. It became a matter of law for the court to decide rather than for the jury.

Another important question of federal law which has not been, but which should be, decided by this Court is presented. The undisputed evidence showed that the draft board sent the petitioner's file to the board of appeal without notification to him. His classification was continued upon appeal without an opportunity for petitioner to take any steps to protect his rights under the Regulations. This issue being established as a matter of law, because there was no dispute of fact, was it the duty of the court below to order the indictment dismissed rather than remand the case to the district court for a new trial?

Last, but not least, there is a question presented in the record in this case which was urged in the courts below that requires the Court to reconsider its decision in *Cox v. United States*, *Thompson v. United States*, and *Roisum v. United States*, Nos. 66, 67 and 68, October Term, 1947 (decided November 24, 1947). Petition for rehearing in those cases is pending and undetermined at the time this petition for writ of certiorari is filed.

In this case the record establishes, as a matter of law, that the petitioner occupies toward the congregation of Jehovah's witnesses of which he was the assistant presiding minister, a position very similar to that enjoyed by the orthodox clergy. Although the record showed that he devoted a substantial amount of time to the performance of his duties as a minister, he performed secular work. He came clearly within the definition of a regular or duly ordained minister as those terms are defined in the Act and Regulations.

Inasmuch as there are certain deficiencies in the proof, according to the opinion of the Court, in the *Cox, Thompson* and *Roisum* cases, which do not exist in the draft board record here, the decision of the Court in the *Cox, Thompson* and *Roisum* cases is not controlling. The draft board record here presents no issue of fact whatever as to the veracity or substance of the evidence offered by petitioner. The undisputed evidence and documentary proof offered by petitioner here decisively establishes that he is a regular and duly ordained minister engaged regularly and customarily in teaching and preaching the doctrines and principles of Jehovah's witnesses and standing toward the congregation which he served in the same capacity as do the clergy of the orthodox religions toward their congregations. He served as the assistant presiding minister of a congregation.

This question was raised by the motion for judgment of acquittal. [197-198] It was also raised upon appeal along with the other grounds urged in the judgment of acquittal. Although the court below did not discuss the question, it inferentially overruled it by refusing and failing to discuss it. The court below was apparently of the opinion that the point was without merit.

Although the court below did not pass upon the question, nevertheless, under the criminal rules, the petitioner is here entitled to urge it to this Court along with the other points that are here raised.

Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and your petitioner further prays that the judgment of said Circuit Court of Appeals, reversing the judgment of conviction and remanding the case to the trial court, be here modified and petitioner be dismissed from custody or, in the alternative, the judgment be affirmed and the cause remanded for a new trial consistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

FREDERICK FRANCIS ZIEBER, JR.

Petitioner

by HAYDEN C. COVINGTON

117 Adams Street

Brooklyn 1, New York

Counsel for Petitioner

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the form and history of the action, the facts, how the issues were raised and the specifications of error, reference is here made to the foregoing petition for writ of certiorari.

Points for Argument

ONE

The refusal of a full and fair hearing upon personal appearance before the local board was a denial of due process of law that invalidated the order supporting the indictment.

A

The local board illegally failed to consider and completely rejected the evidence offered to it by the registrant upon his personal appearance, because it unlawfully regarded his case as out of the local board's jurisdiction on appeal.

B

The local board illegally failed to consider all the written evidence in the registrant's file and the oral evidence offered as though he had never before been classified.

T W O

The local board deprived petitioner of a full and fair hearing before the board of appeal, thereby invalidating the order supporting the indictment, which action was a denial of procedural due process of law.

A

The failure of the local board to reduce to writing oral evidence offered by Zieber upon his personal appearance deprived the board of appeal of evidence, contrary to the Regulations.

B

The failure of the local board to mail Zieber a new classification card and sending the draft board file to the board of appeal without notice to the petitioner illegally denied petitioner the privilege and right of submitting a written memorandum of evidence to the board of appeal.

T H R E E

The denials of petitioner's claim for exemption as a minister of religion and the classification by the boards were arbitrary, capricious, and in excess of the jurisdiction of the draft boards, because they were without basis in fact.

A R G U M E N T

O N E

The refusal of a full and fair hearing upon personal appearance before the local board was a denial of due process of law that invalidated the order supporting the indictment.

A

The local board illegally failed to consider and completely rejected the evidence offered to it by the registrant upon his personal appearance, because it unlawfully regarded his case as out of the local board's jurisdiction on appeal.

Undisputedly the evidence shows that the local board considered the "written argument" of petitioner as an appeal from the IV-E classification given by the local board August 13, 1945. That "written argument" petitioner filed August 21, 1945. It does not state either explicitly or implicitly that he appealed from his classification. Nowhere in that "written argument" can it be inferred that he appealed from the classification. That "written argument" shows on its face that petitioner was imploring the *local board* to put him in Class IV-D, which classification exempted him from all training and service as a minister of religion. At no place in that "written argument" did petitioner request the local board to transfer his case to the board of appeal. On the contrary, the "written argument" appears to be an appeal to the local board to do its duty under the Regulations. [230-245]

It is certainly unreasonable to contend that the "written argument" constituted an appeal to the board of appeal when it was accompanied by a written request for a personal appearance and "hearing before the members of the Berks County Draft Board No. 2 of Hamburg, Pa. in

regards to my recent draft classification of 4-E." [220] It was dishonest, to say the least, and arbitrary for the local board to send its chairman and clerk before the United States District Court to testify that it regarded the "written argument" of the petitioner as an appeal to the board of appeal, especially when the local board itself on August 24, 1945, requested Zieber to appear before the board "for a personal appearance at their next regular meeting to be held Monday Aug. 27, 1945." [221] It should be observed that the local board did not, on August 24, 1945, regard the "written argument" as an appeal to the board of appeal. [221] However, the local board had noted, as of August 21, 1945, on Zieber's questionnaire that the "written argument" constituted an appeal from the classification given. [205] The dishonesty of the local board in requesting Zieber to appear before it, when it regarded his request for personal appearance as an appeal, is most reprehensible and hypocritical. The position of the local board in this case in respect to the personal appearance of Zieber is arbitrary and capricious, to say the least.

The local board had no authority to regard the "written argument" and Zieber's request for a personal appearance as an appeal to the board of appeal. If it did, then it was dishonest in requesting the petitioner to appear before it on August 27. In either event, its action was contrary to law, contrary to the Act and Regulations.

The local board is charged with knowledge of the Regulations. Whether the local board knew the requirements of the Regulations or not is no excuse. The provision for personal appearance in the Regulations is mandatory when requested. Section 625.1 of the Regulations provides that "Every registrant, after his classification is determined by the local board . . . , shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request

therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him."

The purpose of such appearance before the local board is to protect the rights of the registrant, correct illegal actions of the local board, and to obviate, if possible, an appeal in event of an erroneous classification.

Section 625.2 (b) of the Regulations provides that the registrant, upon such personal appearance, "may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification."

It is obvious that the purpose of the Regulations was to afford the registrant a full and fair hearing. The right to a personal appearance is an important one. The petitioner in this case as a registrant was entitled to be heard in person. It is fundamental that a personal appearance before a tribunal deciding any matter at issue is absolutely essential to insure justice and proper administration of law. In fact, the matter of personal appearance is recognized by the judiciary as being an indispensable factor of equal justice under law in the trial courts. It is fundamental that the appellate courts always yield to the finding of the trial court or jury upon issues of fact because the trial court is in a better position to judge the matter than the appellate court, inasmuch as the trial court has the advantage of the personal appearance of the litigants and witnesses. Indeed it would be a rank departure from due process of law were a trial court to refuse to permit parties or witnesses to make a personal appearance before the court. It is the purpose of the law to insure to litigants the right of personal appearance before tribunals, judicial or administrative.

The purpose of the Regulations' providing for personal appearance was to guarantee the rights of registrants to procedural due process of law and to a full and fair hearing. These regulations cannot be circumscribed by arbitrary actions or wanton disregard of the rights of registrants, or a mere desire to be free of a vexatious problem and to pass it on to a higher tribunal.

It certainly will be conceded that in judicial proceedings there would be a violation of procedural due process were the trial judge to deny the right of the litigants to appear personally and to force them to submit their case upon affidavits. The right to such a personal appearance would be defeated and frustrated in such an instance. While there is no constitutional guarantee of the right of a personal appearance before an administrative tribunal, if the regulations provide for the right of a personal appearance before such tribunal the personal appearance cannot be denied. If it is refused, then that constitutes a violation of procedural due process.

In this case the action of the local board was tantamount to a denial of the right of a personal appearance. The local board illegally regarded that the petitioner had appealed his case to the board of appeal. The personal appearance before the local board on August 27 was a hollow formality. Concededly the local board failed to consider the evidence of the petitioner. In fact, the chairman and the clerk both stated that the evidence offered by the petitioner was completely disregarded. This was not a hearing upon a personal appearance of the type required by law. "If one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (*Morgan v. United States*, 298 U. S. 468, 481) "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement

has been neglected or ignored." *Ohio Bell Tel. Co. v. Public U. Comm'n*, 301 U. S. 292, 304.

The draft board's action in arbitrarily and capriciously refusing to give petitioner a full and fair hearing comes squarely within the statements allowing judicial review of draft-board determinations in *Ex parte Stanziale* (CCA-3) 138 F. 2d 312.

The same question was raised in *Lancaster v. United States* (CCA-1) 153 F. 2d 718. There the denial of the right to a personal appearance was held to be harmless error, because upon appeal the registrant was granted a IV-E classification which he had requested. In the *Lancaster* case the registrant made the complaint that the local board did not grant him a IV-E classification, which he claimed. Since the board of appeal gave him what he asked for, the denial of the right to a personal appearance was held to be harmless error.

In the case at bar it should be remembered that the registrant was not given what he asked for, by the local board or by the board of appeal. Therefore the dictum in the *Lancaster* case, that it was erroneous on the part of the local board to deny him a personal appearance, applies.

In *United States v. Laier* (DC-Calif.) 52 F. Supp. 392, the same question was considered by the court as is presented in this case. There the local board denied the opportunity to appear before the local board. The district court found the defendant not guilty because of the violation of procedural due process by the draft board. In that case the court said:

"From the above it clearly appears that the registrant is entitled to a hearing as a matter of right, and it is settled law that such a personal appearance is a part of due process of law in such proceedings. [Citing cases]

" . . . Admittedly the local board failed to comply with these provisions, and the effect of such failure would seem to be that the registrant was not classified at all nor could

he legally be inducted at the time it made its order. In issuing its order the board acted entirely outside its jurisdiction and without legal authority.

"The Government further contends that the appeal by the registrant to the Board of Appeals cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board, he was not prejudiced. The fact that the Board of Appeals sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under the regulations and as a part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial [and] was permitted to make a written statement to the jury was not prejudiced by the denial of his right to personally appear in court and present his case. Moreover, if the regulations had been followed, defendant would have been entitled to an appeal from the new classification which in his case was never made."

B

The local board illegally failed to consider all the written evidence in the registrant's file and the oral evidence offered as though he had never before been classified.

The undisputed evidence shows that the local board did not consider the petitioner's case anew when he appeared before the local board on August 27. In addition to considering the case as though it was out of the jurisdiction of the board because of a supposed appeal, also as illegal justification for not considering the evidence offered by the petitioner, the local board treated his application as though it was a request to reopen a registrant's classification under Sections 626.1-626.14 of the Regulations. Those provisions

of the Regulations do not relate to personal appearance at all. Such sections authorize the boards to reopen classifications when there has been a change in status, or when new evidence in writing is presented which was not considered when the registrant was finally classified.

The erroneous simulating of Sections 626.1-626.14 to Sections 625.1-625.3 of the Regulations (providing for personal appearance) was arbitrary and capricious.

The petitioner had an absolute right to appear before the local board under Section 625 of the Regulations. However, under Part 626 of the Regulations he did not have the right or privilege to have his classification reopened. It was mandatory for the board to consider his case entirely anew under Part 625 of the Regulations; whereas it was not mandatory under Part 626 of the Regulations.

The chairman of the local board testified that the local board did not consider petitioner's case anew when he made his personal appearance before the board on August 27, 1945. That action on the part of the board is in defiance of the Regulations prescribing the duties of the local board upon a request for a personal appearance. After such personal appearance before the local board it is the duty of the board to "consider the new information which it receives and . . . again classify the registrant in the same manner as if he had never before been classified . . ." Regulation 625.2 (e).

In *United States v. Laier* (DC-Calif.) 52 F. Supp. 392, these regulations were considered by the court. In finding the defendant not guilty and dismissing the indictment, on the ground that there was a violation of procedural due process, the court said: "It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant till after such hearing. He must be reclassified in the same manner as if he had never been classified, and he may not be inducted until ten

days after he receives the new notice of classification following such personal appearance."

T W O

The local board deprived petitioner of a full and fair hearing before the board of appeal, thereby invalidating the order supporting the indictment, which action was a denial of procedural due process of law.

A

The failure of the local board to reduce to writing oral evidence offered by Zieber upon his personal appearance deprived the board of appeal of evidence contrary to the Regulations.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia*, "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2 (b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13 (b))

Section 627.13 (b) of the Regulations required the local

board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for petitioner's right under the regulations.

The regulations intend that the classification upon appeal shall be *de novo*. The board of appeal and the President do not have an opportunity to permit the registrant to appear before them personally; they are confined in their consideration to the record made in writing. If the local board did not comply with the regulations requiring it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good a position to pass on the case as was the local board. The regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

The undisputed evidence showed that the local board failed to reduce to writing and place in petitioner's file vital oral evidence submitted by him at a personal appearance relative to this status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received and considered by the local board. The local board, although it did hear the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the Regulations. The board of appeal did not see or have an opportunity to consider all the additional evidence. It did not know of the action of the local board in withholding vital oral evidence received and considered.

The classification of IV-E was affirmed or continued *de novo* solely because the local board failed to include the new oral evidence in the cover sheet. It must be conclusively presumed that the classification of petitioner would have been different and he would as a minister have been exempted from training and service had the local board complied with the Regulations and included a summary of his oral evidence in the file.

This is the precise question that was presented to the court below and to this Court in the case of *Estep v. United States*, 150 F. 2d 768, 327 U. S. 114. However, in spite of the fact that neither court passed upon the merits of such defense, the two dissenting judges of the court below exhaustively reviewed the law in this connection. Reference is made to their opinions. 150 F. 2d 768, 773-781.

If a local board fails to reduce to writing oral evidence and which was received and heard by it, thus withholding such evidence from the appellate agencies of the Selective Service System, the local board will have been transformed into an autonomous agency and the appellate agencies of the Selective Service System made impotent, null and void and forced to depend for their effective operation exclusively upon the whim, caprice and will of the local board. If the regulation on reducing oral evidence considered by the local board to writing and the regulation on reopening a classification are each held to be for the benefit solely of the local board and that the judgment of the local board thereon is final, then the appellate agencies of the Selective Service System will have been deprived of their right to correct errors and illegal acts committed by the local board, contrary to the Regulations.

Certainly Congress did not intend to give the local boards unlimited power to withhold and keep from the appellate agencies evidence offered to it and considered by it under the Regulations. This is especially true because classifications upon appeal are made *de novo* and such classi-

fication should be made according to the status of the registrant at the time of the classification rather than at the time of the registration of the registrant. *Hull v. Stalter*, 151 F. 2d 633 (CCA-7).

Since the board of appeal has the final say as to the classification to be accorded a registrant, it must be assumed that the authors of the Act and Regulations intended that the local board, in all cases where appeals were taken by the registrants, should perform a duty in behalf of the board of appeal very much like a master, referee or notary public taking a deposition. It is the function of the local board to gather all the evidence for consideration by the board of appeal or the President, which appellate agencies pass on all questions involved. If it were otherwise, so that the local board could withhold evidence, written documentary or oral, from the registrant's file forwarded to the board of appeal, the local board would have unlimited powers and arbitrary discretion to determine just what evidence the appellate agencies should or should not consider under Section 623.2 and 626.2 of the Regulations. Thus the authority of the appellate agencies could be circumscribed and their power sapped by whimsical actions of the local board.

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored." *CARDOZO, J., Ohio Bell Tel. Co. v. Public U. Comm'n*, 301 U. S. 292, 304. See, also, *Shields v. Utah-Idaho Central Ry.*, 305 U. S. 177, 182.

"Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." *Morgan v. United States*, 298 U. S. 468, 479-481.

In *Kwock Jan Fat v. White*, 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the Court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country."

Attention of the court is called to the decision of the Fourth Circuit Court of Appeals in *Smith v. United States*, 157 F. 2d 176 (cert. denied 67 S. Ct. 189; rehearing denied 67 S. Ct. 367). There the identical proposition was raised in the appellate court. That court held that it was a question of fact for the jury to decide as to whether or not the draft board had violated the Regulations. The circuit court held that the defendant was not entitled to have his motion for judgment of acquittal granted and the indictment dismissed at the close of all the evidence on account of the failure of the local board to reduce to writing the evidence offered. However, the facts in that *Smith* case can be distinguished from the facts in this case. In the *Smith* case the Government contended that there was an issue of fact as to whether

or not Smith actually gave any oral evidence in addition to the written evidence appearing in the questionnaire. The chairman of the local board testified in the *Smith* case and disputed Smith's testimony as to the evidence Smith alleged he had given to the board at the time of his personal appearance. Here there is no dispute between the testimony of petitioner and the testimony of the clerk or chairman. Both the clerk and chairman concede and contend that the petitioner testified extensively about matters pertaining to petitioner's classification. There is absolutely no dispute as to the fact that petitioner actually gave additional oral testimony at the time of his personal appearance. This fact is established from the Government's own witnesses. Therefore there was no issue of fact on this matter to be submitted to the jury. The undisputed evidence showed that the local board violated the Regulations in failing to reduce to writing the oral evidence offered by petitioner. Therefore the decision in *Smith v. United States* (157 F. 2d 176) does not apply. In any event, even if it did apply, the decision of the *Smith* case is erroneous and should not be accepted as authority here.

The position taken here is supported by the decisions of the United States Second Circuit Court of Appeals in *Kulick v. Kennedy*, 157 F. 2d 811, reversed *sub nom. Alexander v. Kulick*, 67 S. Ct. 1588. In the *Kulick* case the facts with respect to the failure to reduce to writing the evidence given at the hearing before the local board on personal appearance were substantially the same as in this case. What the court said in the *Kulick* case would be applicable in this case. In its *Kulick* opinion the Court of Appeals said:

"At that time he submitted an affidavit and a written statement, asserting that he was a 'regular or ordained minister' of Jehovah's Witnesses; and he testified at length.

(There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.)

"He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed.

"Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defense, from whatever source it comes."

The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of petitioner's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below should have held that the illegality of the order was ground for a dismissal of the indictment and a remand of the case to the Selective Service System. *Tung v. United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States v. Peterson* (DC-ND-Calif.) 53 F. Supp. 760; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

B

The failure of the local board to mail petitioner a new classification card and sending the draft board file to the board of appeal without notice to the petitioner illegally denied petitioner the privilege and right of submitting a written memorandum of evidence to the board of appeal.

The undisputed evidence shows that the local board promised to notify the petitioner of the outcome of his personal appearance before the local board. The record also shows that the board wholly failed to notify the petitioner of the action taken by the board upon the personal appearance. The failure of the local board to mail to the petitioner a new classification card constituted express violation of Section 626.2 (d) of the Regulations, providing that—

“After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant . . . ”

The right of appeal to the board of appeal, and the right of the registrant to make a statement upon the appeal is a valuable one. To deny that right constitutes a denial of due process of law. *Tung v. United States* (CCA-1) 142 F. 2d 919.

It was highly prejudicial to petitioner to send his case to the board of appeal without notifying him. If the board had notified petitioner of the fact that his case had been forwarded to the board of appeal, or if the board had mailed him a classification card following his personal appearance, as required by the Regulations, he would have been apprised of the fact that his case would go before the

board of appeal. The Regulations confer a privilege, although it is not a duty, upon the registrant to make a written statement upon appeal, with reference to his claim for classification and any error committed by the local board.

Section 627.12 of the Regulations gave petitioner in this case a right to make a statement in writing to the board of appeal. The regulation provides, *inter alia*, "The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

It must be conceded that the local board deprived the registrant of this privilege. This was an important right to which petitioner could have resorted to protect his rights upon appeal, had he been informed of the appeal. The failure of the local board to notify him of the appeal, and to send him a classification card, denied him this valuable right and privilege. The action of the board is contrary to explicit provisions of the Regulations.

In *Smith v. United States* (CCA-4) 157 F. 2d 176, the court of appeals discussed the right of the registrant to make a statement upon appeal under this regulation. Reference is here made to that part of the court's opinion in the *Smith* case that refers to this privilege.

THREE

The denials of petitioner's claim for exemption as a minister of religion and the classification by the boards were arbitrary, capricious, and in excess of the jurisdiction of the draft boards, because they were without basis in fact.

In his questionnaire petitioner showed that he was a minister of religion and customarily served as such since November 15, 1942. [204] He also informed the board that he worked as a paint filler for the Glidden Company in Reading, Pennsylvania. [202] Petitioner explained fully that he was an ordained minister although he had not been ordained in the formal ecclesiastical sense of the word. [206] He claimed Class IV-D. [205, 207-208] He informed the board that he preached as a missionary evangelist from door to door. [211-212, 214] Later he filed a written argument pointing out facts showing he was a minister duly ordained and regularly engaged in teaching and preaching. [233-243] He also explained fully why he was engaged in secular work. [243-244] He showed the board that the gas ration board at Reading had classified him as an ordained minister and given him preferred rations of gasoline as a minister. [244]

In concluding his "written argument", he said: "Also I wish to state and present ample evidence by petitions that besides visiting the people at their homes with the comforting Bible message, I also am in charge of, and conduct the regular weekly assemblies for worship at the congregational headquarters of the Kutztown, Pa. Company of Jehovah's Witnesses. In line with these ministerial duties I am also called upon to deliver hour lectures on Bible prophecies and their present day fulfillment. I am submitting a leaflet advertising one of my hour discourses to which the public in the Kutztown area are invited for spiritual sustenance and comfort." [244-245]

Zieber also filed a petition bearing 148 signatures certifying that he was assistant presiding minister of the Kutztown congregation of Jehovah's witnesses regularly engaged in conducting assemblies for worship at the church every Sunday. The petition indicated that he had been recognized by the Watchtower Society as an ordained minister and was appointed to the congregation because of his ability as a minister. [246]

The ordination certificate of the Watchtower Society showed that he was assistant presiding minister supervising the activities of the church in the Kutztown area and also performing other services. [247-248]

He also submitted a petition to the board signed by all of the members of the local congregation of Jehovah's witnesses certifying that he was assistant presiding minister and Watchtower study conductor in charge of the services for worship at the headquarters and meeting place of the congregation and that he had been conducting such services for the congregation since September 1942. The certificate also proved that in addition to such congregational duties, he faithfully carried out his commission as a missionary evangelist by conducting Bible studies in the homes of the people and preaching the gospel from house to house. [139-140]

The proof showed that he devoted about 25 hours per week to his secular work [124-125] and about 28 hours per week to the performance of his ministerial duties. [95, 97-98, 99, 124-125]

The conclusion of the Court in the cases of *Cox v. United States*, *Thompson v. United States* and *Roisum v. United States*, Numbers 66, 67 and 68, October Term, 1947, (68 S. Ct. 115) ought not to control upon this question here.

For further argument under this point reference is made to the main brief and the petition for rehearing for the petitioners, in the *Cox*, *Thompson* and *Roisum* cases, and the brief for the prisoners in the cases of *Alexander v. Kulick*,

No. 840, October Term, 1946, and *Sunal v. Large*, No. 535,
October Term, 1946.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed.

Petitioner further prays that the judgment rendered by the circuit court of appeals be modified and the district court ordered to discharge petitioner or, in the alternative, that the judgment reversing the district court and ordering a new trial be affirmed.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 503

FREDERICK FRANCIS ZIEBER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 24, 1946, petitioner, a Jehovah's Witness, was convicted and sentenced to imprisonment for three years in the United States District Court for the Eastern District of Pennsylvania for having failed to report for work of national importance, as directed by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311) (R. 1, 264). At his trial, the material contents of petitioner's selective service file were received in evidence (see R. 201-263), and the jury was instructed that the selective service classification was final, unless it was arbitrarily made, and

extensive instructions were given concerning the proceedings before the local board (R. 155-178). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment was reversed (R. 271). The court held that the jury had been incorrectly instructed concerning a meeting which petitioner had with the local board on August 27, 1945, and that a new trial should be had in which the controverted issue of procedural due process could be fully explored and submitted to the jury under correct instructions (R. 266-271).

Petitioner's basic contention in this Court is that the court below should have ordered the indictment dismissed on the ground that his classification was illegal, instead of remanding the cause for a new trial. But as Judge Biggs, speaking for the Third Circuit, points out, the determination of the question whether petitioner was deprived of procedural due process depends on the resolution of controverted issues of fact, and this is appropriately the function of the jury. In this respect, the case is unlike *Cox v. United States*, No. 66-68, decided November 24, 1947, where this Court held that the question whether there is any evidence in the administrative record to support the selective service classification is a question of law for the court. In this case it is necessary to go outside the administrative record and receive testimony concerning the circumstances of the August 27, 1945, hearing. Reso-

lution of the controverted factual question is appropriately one for the jury under proper instructions. See Mr. Justice Frankfurter, concurring in *Estep v. United States*, 327 U. S. 114, 145. Accordingly, we think that, assuming the defense was open to petitioner, the court below properly remanded the case for a new trial.

We have a more fundamental difficulty with this case than any which petitioner urges. The court below held (R. 267-268) and petitioner insists (Pet. 22-23) that he did not take an appeal from the local board to the board of appeal. Assuming, *arguendo*, that all the procedural defects which petitioner urges did occur before the local board, they could have been corrected by an administrative appeal. Thus, for example, if petitioner had availed himself of his appellate remedy in the administrative process he would have been permitted to submit to the board of appeal "a statement specifying the respects in which he believes the local board erred;" he would have been permitted to direct attention to any information in the selective service file which he believed the local board failed to consider or give sufficient weight; and he could have submitted to the board of appeal "any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." Selective Service Regulation 627.12, 6 F. R. 6845. In short, petitioner could have

availed himself of a well known administrative remedy and he failed to do so. Indeed, in his argument in this Court, as in the courts below, he insists that he did not appeal. In these circumstances, it is plain that he failed to exhaust his administrative remedies and is not entitled to defend on the ground of illegal classification. *Falbo v. United States*, 320 U. S. 549. The decision of the court below was consequently more favorable to petitioner than the law requires.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

T. VICENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

JANUARY 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 503

FREDERICK FRANCIS ZIEBER, JR.

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

PETITIONER'S REPLY
to Memorandum in Opposition

HAYDEN C. COVINGTON
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 503

■

FREDERICK FRANCIS ZIEBER, JR.

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THE UNITED STATES OF AMERICA

Respondent

■

**PETITIONER'S REPLY
to Memorandum in Opposition**

MAY IT PLEASE THE COURT:

Falbo v. United States, 320 U. S. 549, does not apply because the administrative appellate agency acted in petitioner's case. Petitioner is like Dodez. *Dodez v. United States*, 329 U. S. 338. Although petitioner did not appeal, the local board sent the case up to the appeal board. Therefore the administrative remedies were exhausted. Compare *Johnson v. United States*, 126 F. 2d 242 (C. C. A. 8th), with *Tung v. United States*, 142 F. 2d 919 (C. C. A. 1st).

The privilege of filing the statement upon appeal granted by Section 627.12 of the Selective Service Regulations (6 F. R. 6845) being optional with the petitioner does not excuse the local board from doing its duty. "The government contends that any deficiency in the record on appeal was immaterial and gave the defendant no right to complain because he had the power himself to correct the record under the provisions of § 627.12 of the Selective Service Regulations which provide that a registrant who takes an appeal to the board of appeal 'may attach to his notice of appeal or to the Selective Service questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.' In our opinion this regulation does not relieve the local board of its duty in the premises or mitigate the consequences of a failure on its part. The regulation confers a privilege but does not impose a duty upon the registrant; for it cannot be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation, assisted by counsel, and therefore charged with the obligation to examine and approve a record on appeal." *Smith v. United States*, 157 F. 2d 176, cert. denied 67 S. Ct. 189, rehearing denied, 67 S. Ct. 367.

Regardless of the controverted fact or the dispute between the testimony of the clerk and of the petitioner as to what transpired upon the personal appearance, the indictment should be dismissed. The Government's own witness swore to facts which established the violation of the regulations as a matter of law. In determining whether the indictment should be dismissed the Government's evidence

should be accepted as true. Since it must be taken as correct the indictment should be dismissed.

Also the indictment should be dismissed because there was, as a matter of law, no basis in fact for the denial of the claim for exemption. The classification was without basis in fact. For this reason the indictment should have been dismissed, the *non-precedent* decision of *Cox v. United States*, Nos. 66-68, decided November 24, 1947, notwithstanding.

HAYDEN C. COVINGTON
Counsel for Petitioner

January, 1948.